

NO. 2515

---

IN THE

**United States  
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

---

O. ITOW and E. FUSHIMI.

*Plaintiffs in Error,*

*vs*

THE UNITED STATES

*Defendants in Error.*

---

IN ERROR TO THE DISTRICT COURT FOR  
ALASKA, DIVISION  
NUMBER ONE.

**Brief of the Plaintiffs in Error.**

---

J. H. COBB,

*Attorney for Plaintiffs in Error.*

---

Filed



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

O. ITOW and E. FUSHIMI.

*Plaintiffs in Error,*

*vs*

THE UNITED STATES

*Defendants in Error.*

---

IN ERROR TO THE DISTRICT COURT FOR  
ALASKA, DIVISION  
NUMBER ONE.

---

**Brief of the Plaintiffs in Error.**

---

J. H. COBB,

*Attorney for Plaintiffs in Error.*



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

O. ITOW and E. FUSHIMI.

*Plaintiffs in Error,*

*vs*

THE UNITED STATES

*Defendants in Error.*

---

IN ERROR TO THE DISTRICT COURT FOR  
ALASKA, DIVISION  
NUMBER ONE.

**Brief of the Plaintiffs in Error.**

---

STATEMENT OF THE CASE.

The Plaintiffs in Error, whom we shall hereafter refer to as the defendants, were jointly indicted in the District Court for Alaska, Division Number One, on the 13th day of December, 1912, for the murder of Frank Dunn, alleged to have been committed on the 14th day of July, 1912. The defendants were

on the same day, and in the absence of their counsel, arraigned. On the next day, their counsel still being absent, the defendants had counsel appointed for them by the Court, and plead "not guilty," and the case was set for trial to follow the case of the United States vs. Dick Manson.

Defendants are Japanese fishermen, unable to speak or understand the English language, except a little "pigeon English" in use among hands around the salmon canneries. They could not communicate with their counsel or testify except through an interpreter. All the witnesses for the defense, with one exception, are in the same situation. And these witnesses at the time of the indictment, arraignment, and pleas were all in Seattle, Washington, or Portland, Oregon. Application for process for these witnesses was made and granted on December 20th, 1912.

On January 2nd, 1913, the case was called for trial. Counsel for defendants thereupon asked for a postponement until Monday (which was January 6) exhibiting a telegram from the United States Marshal at Portland, Oregon, to the Marshal at Juneau under date of December 30th reading, "Two witnesses leave for Juneau tonight. Washout between here and Seattle. If able get through will leave Seattle Tuesday thirty-first on Steamer Northwestern." Defendants strenuously objected to be-



ing compelled to go to trial until their witnesses arrived and their counsel had had an opportunity to talk with them and prepare for trial. The court denied the application to postpone and compelled the defendants to go to trial without a single witness for the defense being present, and before their counsel had had any opportunity whatever to make the slightest preparation for trial. Time to make a written showing was even denied. To all this an exception was reserved. Later in the day a telegram was received notifying the defendants' counsel that the witnesses were all on the Steamer "Dolphin" enroute to Juneau, and based on this information an application was made to the court to postpone the trial to the arrival of the Dolphin, about January the 6th or 7th. This application was refused, and exception reserved. The jury were drawn on January 2nd and 3rd, and the District Attorney made his opening statement. Counsel for defendants declined to make an opening statement on the ground that having been unable to see the witnesses who were still absent he was unable to make a statement. The government completed its evidence in chief the 6th of January. On that date the witnesses for the defense still not having arrived (the Dolphin was delayed by weather) an adjournment was taken until January the 8th; and on that date and for the same reasons, a further adjournment was taken until the 10th.

In the meantime, and at each adjournment of court, the jury were not kept together, but suffered to separate and go about their several vocations in and around the town of Juneau. On January the 7th there was published in one of the daily local papers a purported interview from the District Attorney bearing on the case.

On the reconvening of Court on January 10th the following proceedings were had.

“Mr. Cobb: I desire to present a motion at this time. I think in view of the nature of the motion the jury may be withdrawn. The defendants at this time move that this jury be discharged from further consideration of this case. The grounds of the motion I will state that in view of the insistence of the District Attorney to take up the case at the time it was taken up before the arrival of the witnesses for the defense and the court compelling us to go to trial at that time, counsel for the defendants consented that the jury might not be kept together during the four or five days’ intermission of the trial which was largely rendered inevitable. Notwithstanding that the court counselled all parties connected with the case, cautioned all parties to be careful, that there might be no impropriety in the conduct of any of the parties connected with the action, the district attorney, on last Monday, and knowing that the jury were not under surveillance but loose all over the



town, going about their ordinary avocations, gave out the following interview to the press: "Japanese are accused of many crimes. Federal official tells of cannery conditions. Many crimes committed by alien labor employed in canneries which is not reported to courts. 'It is not at all unlikely that there are more murders committed among the canneries of southeastern Alaska than we have any idea,' said United States District Attorney Rustgard this morning." This is a paper under date of Tuesday, January the 7th, 1913. "Said District Attorney Rustgard. "There is no question but that among the orientals employed in the canneries the fixed idea prevails that any attempt on the part of one of their workers to abandon his employment is an offense which should be punishable with death. Last year, at the Weiss cannery, near Shakan, a Corean threatened to leave the cannery. He was an oriental of unusual intelligence and education and could talk in four languages. He had adopted the ways of civilization, and the constant diet of unsalted rice was more than he could endure. He attempted to escape, but was caught. He was murdered, and eight Japanese took part in the crime. His skull was crushed in with a rock, a pistol bullet was fired through his neck, a stone was tied to his body, and he was thrown into the bay. Had not the sea given up its dead, it is practically certain that the crime would never have been known. But six weeks or two months after-

ward the body floated. The cannery officials claimed, and the claim was doubtless a truthful one, that he had never been missed by them and that they knew nothing about the murder. After an investigation by the prosecuting attorney's office they were morally certain of the conspiracy, and the reason the murder was committed, but there was a failure of conclusive evidence, and so, when one of the Japanese offered to plead guilty to manslaughter, on condition that the other cases would be dismissed, the offer was accepted. Afterwards the full story of the murder was obtained. The eight Japanese had committed the crime, but the one who had confessed had been selected by the lot to plead guilty on condition that the others be freed. When a statement was taken by representatives of the prosecuting attorney's office in the Itow case, of the bookkeeper of the cannery, a Japanese, he was asked if he had not himself shot at Frank Dunn about a week before the tragedy for which Itow and Fushimi are now being tried. He said that he had not. He was then asked if, once when Dunn had claimed to be sick, he had not gone to his room to get him to go to work because the cannery needed his services, he had not ended by shooting at Dunn. 'Oh, oh!' said the bookkeeper, with a gesture of impatience, 'really I had forgotten it.' But he insisted that he had not intended to shoot him, but merely to frighten him. For a long time refugees from canneries coming to Juneau have claimed

not only that they were held as slaves, but that they were virtually shanghaied at San Francisco and Seattle. Although it is true that most of the unfortunates are either orientals or Mexicans, or in a few cases, Spaniards, it is undoubtedly true that there were other American boys, like Frank Dunn, who, finding themselves improverished in a strange city, have become victims of the system. And as these would find it more difficult than the others to endure the fare, it is probable that many of the victims buried beneath the waters of the sounds and straits of the Inside Passage were born on American soil."

Of course, I having no means of knowing—it is manifestly improper to make any inquiries as to whether that piece was read by the jury or not, but I feel morally certain some, if not all, of them did read it. The court will note that the heading of it is artfully disguised so as not to indicate that in the beginning it relates to this case, and a man picking it up, although he did not intend to read anything about it, would be misled into reading it, the same way that advertisements are gotten up. Not only that, but the article published as it was, makes a kind of atmosphere so sinister to the defendants in this case, whose story has never been heard by the public, that I don't believe that any man could walk the streets of Juneau, as this jury has done, without feeling this intense atmosphere of hostility that has especially

developed since the publication of that infamous article. I desire to say furthermore, in that connection about it, especially about the shooting, I am informed by the Japanese interpreter at that time, who is a man of high character, up in the diplomatic service of his country, and came over to this country. He was doing the interpreting at the time that statement was made by Itow, and the district attorney had reason to know that his statement would be material in this case and the statement was in this way false. I make this motion following the ruling of the Circuit Court of Appeals of the Ninth Circuit in a civil case in which the misconduct of the counsel was incomparably less than in this case, and that was in a civil case, and the court said that the motion that was made should have been granted. I refer to the case of the Alaska Treadwell Gold Mining Company against Cheney, the 162nd Federal, 593.

Mr. Rustgard. May it please the court, counsel has read a small article, accrediting it to me and evidently wanting it to go on record as a quotation from myself. The article quotes, I think, six or eight lines from me, and what is quoted I admit is a statement which I made. I submit, however, that I did not make the statement for publication. The conditions under which I made it were substantially as follows: One of the representatives of the paper came into my office and started to talk about something entirely different, touching proposed legislation and the



work of the next legislature of Alaska. The conversation drifted over on this particular case, and in that conversation I did make the statement contained in the first six or eight lines in the article in question. The rest of it was partly probably gotten from me; partly from others. It is a matter that has been discussed at various times, and the court will realize that now, when there are two newspapers in this town, they are both given to getting the "scoop" on the other; for that very reason I have invariably admonished the newspaper men who call at my office daily to refrain from publishing anything with reference to any case that is on trial or that is probably for trial during this term, in order that those who may be summoned as jurors should in no way be influenced, I think the court knows that is the position I have taken in every respect. I do say that I regret that that article was published, but I don't believe that it has reached any of the jurors. When counsel and myself consented that the jury might be allowed to go or be at liberty during the trial, it was undoubtedly because both counsel and myself personally know the jurors serving on this panel and personally have sufficient confidence in each and all of them to believe that they would in every particular obey the instructions of this court. I dare say that I have taken pains to watch the behavior of all the jurors during the recess of the case, and I have found that they have walked with exceptional circumspection

in every particular. For that reason I am satisfied, as I am also satisfied that counsel knows and is convinced, that they have not allowed anybody to talk to them or in their presence touching the case or that they have read any article touching the case. On that I am perfectly satisfied and perfectly confident. The court must also realize that in the present stage in this city where there are two newspapers we must expect that the newspapers are going to publish something concerning the case during the trial, and counsel knew that when he consented to having the jury not keep together during the trial and he must have consented to it upon the reliance that though there would be articles published touching the case, yet they would obey the instructions of the court and refrain from reading anything on the subject. Under the circumstances it is evident that if the rule which counsel invokes should be the law, the jury would have to be shut up in every case, because it is impossible at the present time to keep the newspapers from publishing anything concerning a case, although I will say, personally. I have taken the utmost precaution and admonished all of them from making statements pending the trial and prior to the trial. That is all I have to say your Honor.

Mr. Cobb. If the court please, I should not be so much concerned about any thing that emanates from the newspapers as such. I know, as said by some jurist, that most men pay little attention to



that, but here is an article which purports to emanate right from the district attorney's office which evidently did emanate in part from it and which contains matter which could only have come from the district attorneys office involving the secrets of the investigations made concerning this very matter. Not only that counsel is complaining of the newspapers—there is only one of them that has been guilty that I know of, of any improper conduct during this term of court; that paper is absolutely controlled by this court; since shortly after the failure of the Record Miner it has been known as an administration organ; it is now being run by a receiver who is an officer of this court and also the guard at the jail, which is within the knowledge of everybody. Its news editor is a brother-in-law of the marshal of this court. The paper is closely identified with the officers of the government in southeastern Alaska. Now that sort of a statement published in a paper of that sort, purporting upon its face to emanate from the district attorney's office, I may state, prevent it from being possible for these men to secure a legal trial before this jury or any other—before any jury gotten in southeastern Alaska. The complaint the district attorney makes against the papers and probably thinks is true to a certain extent. All the more reason why under the circumstances, after the jury being loose here, why he as an officer of the government should have refrained from giving out any statement to

the newspapers for publication at that time. He states that he didn't give it out for publication. All I know about it is his statement and the statement I have taken from Mr. Russell that the interview was a statement from that officer.

Mr. Rustgard. Mr. Russell never called on me at all.

Mr. Cobb. I said it was an interview taken by Callahan. Let that be as it may the wrong has been done and I know of no way of righting it except to call a halt as we have.

The Court. "Call the jury; let me take the article which you referred to. The jurors will probably remember that after you were empanelled and sworn in this case the Court asked in particular among other things that you refrain from reading newspapers during the trial of this case and if you did read newspapers that at least the parts that referred to this trial should be removed by your friends or family so that nothing should be read that would touch upon this trial. It has been brought to my attention that an article in the paper called the Daily Alaska Dispatch on the 7th of January, Tuesday. I will now ask the jurors if any one of them had occasion to read what appeared on that date an article entitled "Japanese are accused of many crimes" and purported to give a history of general conditions about canneries and incidentally touched upon at least one

phase of the present case that we are trying. If any juror had occasion to read that I would ask that—it may inadvertantly have come into your hands and without knowing it was about this case and you read it; if he did I want you to let me know and you can do that by raising your right hand. I will ask did anybody say anything to you about such an article or in your hearing pertaining to this case or Japanese in Alaska?” (None of the jurors responded.) “The motion is denied. You may proceed gentlemen.”

Mr. Cobb. We reserve an exception.

After the examination of the first witness for the defense, the government asked leave to reopen the case and introduce further testimony in chief. Leave was granted over defendants objections.

The district attorney then offered in evidence a typewritten copy of questions propounded by him to E. Fushimi and the latter's answers thereto taken in the district attorney's office on December 10th, 1912. Fishimi at the time was not under oath.

To this statement defendants counsel objected on behalf of Itow that it was hearsay and incompetent; that if offered as a confession or admission against Fushimi the government should have had separate indictments and trials. On behalf of Fushimi it was objected that the statement was a privi-

leged communication and could not be used without his consent. The objections were overruled, Exceptions taken and allowed, and the statement read to the jury. It is as follows:

“Statement of Eddie Fushimi (through Kinya Okajima, interpreter, December 10, 1912.)

Q. (By U. S. Attorney Rustgard.) I understand that you know something about the killing of Frank Dunn over at Dundas Bay last summer. I want you to tell me all you know about it and all you saw about it.

A. They both quarreled and one of them killed.

Q. Now, what was the quarrel about?

A. Don't know.

Q. When did you first hear about the quarrel?

A. I was there. I was there while they quarreled, but I don't know.

Q. Where was it that Frank was killed?

Interpreter. I can't understand this fellow. He says bridge or slope-pridge, and then pig pen, or pig house he called it—and between the plank or slope he called it—you know in Japanese he says bridge, you see—and between the pig house there is a hilly place—that is the place.



Q. Will you look at this picture and see if that represents the place where Frank was killed?

Interpreter. He says this picture doesn't show it very well; he says killing took place just other side of this plank here, and, really, it is sort of continuation of this plank, he says, but this picture does not show it very well, he says.

Q. Now, do you mean to say that the killing took place to the left of the bridge leading up to the door of the China house, as represented in this picture, and above the double-plank walk along the beach?

A. Yes; and he says he wants to say this, according to the picture these two planks look straight, continuation of this bridge but it is not so, that it is just turned this way and this other one sort of continuation of this.

Q. These double planks at the left of this picture are at an angle, and almost a right angle to the bridge up to the door?

A. This one yes; that is what he says, this one—sort of continuation of this, but this picture don't show this.

Q. Now where were you at the time Frank was killed?

A. Near the entrance to the house.

Q. Well, how far from Frank were you?

A. Well, he says—he says he can't tell how many fight, but Frank was killed down below and he was up there.

Q. Do you mean to say that you were standing at the upper part of the bridge leading up to the door of the China house at the time Frank was killed?

A. Yes.

Q. How long had you been standing there at the time Frank was killed?

A. Just—justa—only a little while; as soon as I saw it I went to the superintendent's house.

Q. Well, where did you come from at the time you came up there?

A. Came from Indian town.

Q. What were you doing at that time?

A. He was was going to the toilet, and then opened door and Frank came out.

Q. Were you standing near that door of the China house at the time Frank came out?

A. Yes.

Q. Did anybody else come out with Frank?



A. Nobody.

Q. Did Frank come out alone?

A. Yes.

Q. Now, when Frank came out what did he do?

A. No; he didn't do anything.

Q. Well, where did Frank go to?

A. He says he went into the house, and then I heard something, and came out again, he says.

Q. Now, you went into the house first, then you heard some noise and you went out again; is that correct?

A. Yes.

Q. Now, how long had you been in the house when you heard the noise and went out again?

A. He says, I can't tell just how long it was, but I went in the house and walked about twenty steps and then entered the toilet and came out, so I don't know how long it was.

Q. Well, did you see Frank when you went out?

Interpreter. Frank went out of the house you mean?

Q. Yes. Did you see Frank when he went out

of the house; that is the question. Did you see Frank when Frank went out?

A. From the house, it is when Frank went out of the house?

Interpreter. He says he does not understand the question. What do you call that house?

Q. China house?

A. Well as soon as he came out the quarreling began.

Q. That is not the question. I want to know whether he saw Frank go out of the China house?

A. Yes, I saw him.

Q. Where were you standing at the time Frank came out of the door of the China house?

A. I was standing near the door.

Q. Inside the doorway or outside the doorway?

A. I don't remember.

Q. After Frank went out, where did he go?

Interpreter. Did Frank?

Q. Where did Frank go after he left the door of the China house?

A. He went to—he went to strike Itow.

Q. Where was Itow?

A. He was—I don't quite understand—he say Itow fell down on the ground.

Q. Itow was down on the ground?

A. Yes.

Q. What did Frank do then?

A. Frank striked him.

Q. What did he strike him with?

A. Hand, with his hand.

Q. Where did he strike Itow?

A. Did't see.

Q. How far from the walk leading up to the China house—this bridge you refer to—was Itow lying when Frank came out and struck him?

A. Well, close to the end of the bridge.

Q. Well, was there anybody near except those two?

Interpreter. He says he doesn't remember; he is just thinking; he hasn't answered at all you know.

A. Well, it may be the Chinaman was there because he was the first one came out of the house, he says.

Q. Well was there anybody standing near Itow and Frank at the time the two were together and at the time Frank struck Itow?

A. I don't think there was anybody.

Q. Now, was there another Japanese near you at that time?

Interpreter. What time do you refer to?

Q. The time Frank struck Itow?

A. No, no.

Q. Did you see Mr. Ohto there at that time?

A. No.

Q. Did you see him in the China house?

A. No.

Q. Was he standing near you?

A. No.

Q. Now, do you know the reason Frank went out of the China house?

A. Why, I think he went to strike Itow, I suppose.

Q. How is that?

A. He says, went for the purpose to strike Itow, I think.

Q. Now, after Frank struck Itow, what did Itow do?

A. Didn't do anything.

Q. Didn't do anything—did he lay still?

A. Yes; at the time he was still there.

Q. Did he get up after he was struck?

A. Yes.

Q. After he got up what did he do?

Interpreter. You refer to Itow when you say "he?"

A. Yes.

A. He got up and walked toward the China house.

Q. Itow walked towards the China house.—what did he do there?

Interpreter. In the China house, you mean?

Mr. Rustgard. Yes.

A. He was disputing in words with Frank and saying why Frank struck him, etc.

Q. He and Frank were arguing the case?

A. Yes.

Q. Well, what happened then?

A. Frank struck Itow again.

Q. What did he strike him with?

A. He says with his hand.

Q. Where did he strike Itow?

A. I don't—I can't tell you.

Q. Where were you standing at that time?

A. Near the door.

Q. You were not standing at the same place?

A. Well, not exactly the same spot, but near the door.

Q. Well, after Frank struck Itow that time what did Itow do?

A. He struck Itow; Itow struck Frank with the case of the sword, that is with the sword in the case you know—what you call that, I forget that word.

Mr. Rustgard. Scabbard.

A. Scabbard—case, you call scabbard, and they had it in a big, you know what they call it\* clothes bag.

Q. Outside the sword?

A. You know with the clothes on he struck.



Q. Where did he strike Frank with that sword in the scabbord?

A. I can't tell just where he struck.

Q. Do you know where he hit Itow—I mean where did Itow hit Frank with the sword and the scabbard?

Interpreter. I don't quite understand what he means in Japanese, so I am asking him what he means.

Mr. Rustgard. Go ahead; just go after him and get the answer to my question.

A. He says he doesn't know where he struck.

Q. Well, couldn't you say where Itow hit at that time?

A. I didn't see where he struck.

Q. Well, how far away from you was he at that time?

A. Why, close, I was right close.

Q. How many feet away were you?

A. Possibly two feet.

Q. About two feet away?

A. Yes.

Q. What did Frank do then, after Itow struck him with the sword in the scabbard?

A. He held the scabbard—he held the scabbard with his left hand, I remember he says.

Q. Yes, now, then, what did he do with his right hand?

A. Struck the other fellow.

Q. Where did he strike him?

A. I can't tell just where.

Q. Is this the sword lying here?

A. Yes.

Q. Now, what did Frank do then?

A. Frank, he—hit Itow with his right hand, holding the scabbard with his left hand, and Itow struck him too—Itow struck Frank too.

Q. What did—

A. No; I don't—excuse me, he understood what I said. He did not mean that—oh, he meant, Frank hit Itow, holding the scabbard with his left hand, that is all he said—I misunderstood him.

Q. Tehn Frank took hold of the scabbard with his left hand?

A. Yes.

Q. And then Itow did what?

A. He says he fell down right—Itow fell down right—somewhere near the bridge.

Q. Did Itow fall down?

A. Yes.

Q. After he had struck Frank with his sword that is what you mean ?

A. Yes—I see, while Frank hit Itow and then Itow fell down.

Q. Itow fall down?

A. Yes.

Q. That is the second time, when Frank hit him—Itow, is it?

A. Yes.

Q. Well, then what did Itow do after he had been knocked down?

Interpreter. You want to know after Itow fell down what Itow did?

Mr. Rustgard. Yes sir. Well, let us have it. Go ahead and tell it.

A. After a little while he got up.

Q. What did he do after he got up?

A. He—when he got up, he says, well—hollered that he hurt Frank.

Q. Itow said he hurt Frank?

A. Itow said he hurt Frank.

Q. Did Frank say anything about having been hurt?

A. Just a groan.

Q. Groan?

A. Yes.

Q. Where did Frank go?

A. Frank walked staggering toward the road leading to Ondian town.

Q. How far did he walk?

A. Six or seven big steps.

Q. Well, what did he do then?

A. Frank, you mean?

Q. Yes.

A. He fell down and I went to see the superintendent; I don't know anything more.

Q. Well, did you look at Frank when he fell down?

A. I saw him fall, but I did not go close to him.

Q. Did you see how he fell, whether on his face or on his back?

A. No; I didn't notice it.

Q. What did Itow do then, after he got up and said he had hurt Frank?

A. He says, when he started towards the superintendent's house Itow was there in the same place.

Q. Now, who was the superintendent—what is his name?

A. I don't know his first name; his name is Mr. Nelson.

Q. That the gentleman sitting there behind him (indicating)?

A. Yes.

Q. Now, did you and Itow go down to Nelson's house together?

A. That was afterwards, but first I went myself.

Q. Well, what did you go down to the superintendent's house for?

A. To tell him about the trouble.

Q. Now, when you came back from the superintendent's house, did you see Itow up near the China house?

A. Now, when I left the superintendent's house, was going back to the place I was before, I met Itow on the way and he could hardly walk, so I helped him to walk to the superintendent's house.

Q. What was the matter with Itow at that time—why couldn't he walk?

A. I don't know why.

Q. Well, had he been hurt?

A. Well, he was struck you know.

Q. Oh, he was struck—was hurt by Frank so that he could hardly walk; is that it?

A. Well, I can't tell you about that; as to that, I don't know about it.

Q. Well, did he at the time complain to you that he had been hurt?

A. Yes.

Q. Where did he say that he had been hurt?

A. He simply said that he hurt me bad.

Q. Didn't Itow tell you where he was hurt—what part of the body he was hurt?



A. No.

Q. Did you ask him what part of the body troubled him?

A. No.

Q. Where did you take Itow to?

A. To superintendent's house.

Q. Well, at the time Itow and Frank had the fight outside did you see Ohta there?

A. No.

Q. Now, was there any other Japanese near except yourself and Itow?

A. Yes; there was Japanese, but I don't know where he came or where he come from.

Q. Who was the other fellow?

A. W. Nakayama.

Q. Now, what was he doing there?

A. He wasn't doing anything.

Q. Where was he standing at the time these two men had the fight?

A. I don't know just where he was standing.

Q. Where did you see him standing?

Interpreter. You mean to say where this man was standing?

Q. Where did you see Nakayama standing?

A. Nakayama was on the bridge, he says.

Q. How far from you?

A. I don't know how far, of course.

Q. Well, can't you state approximately?

A. Not—just a little way, just a little way.

Q. Now, was Nakayama there at the time the fight commenced?

A. No; he wasn't there when it started.

Q. How long after the fight started did he come?

A. Just a little while after that; I don't know how soon after that; possibly the fight started he heard it, and he came out, I guess.

Q. How far from Itow were you at the time he struck Frank with his sword?

A. About two feet away.

Q. How far was Nakayama away from Itow at that time?

A. I can't say where he was at that time—Na-

kayama you are referring to—Nakayama, you know, I don't remember.

Q. Can't you say how far away from you he was at that time?

Interpreter. You refer to Nakayama?

Mr. Rustgard. Yes.

A. I should judge—I should judge six or seven feet.

Q. Now, where was he standing at that time when he was as much as six or seven feet away from you?

A. On the bridge; standing on the bridge.

Q. Were you standing on the bridge, too?

A. No; I was close to the door.

Q. Well, where was Frank and Itow at the time Itow struck Frank with the sword the last time?

Interpreter. Itow struck Frank with the sword you mean?

Mr. Rustgard. Yes.

A. Frank was right close to me near the door, and then Itow first fell down you know; he came up near the house, near to the entrance to the house.

Q. Well, after Itow was knocked down did he

go back up to the house where Frank was?

A. Yes.

Q. Well, were they standing on the bridge in front of the doorway at the time they had the last fight?

Interpreter. You mean two, the boys?

Q. Itow and Frank standing on the bridge leading up to the doorway in the China house the time they had the last fight?

A. Yes.

Q. How far from the door?

A. They were right close to the door, and possibly in the fight may be inside the door.

Q. I see, right in the doorway?

A. Yes.

Q. After Itow had struck Frank the last time did Frank walk from the doorway of the China house toward Indian town?

Interpreter. From the doorway you say?

Mr. Rustgard. Yes.

A. No. They fell down first and then walked toward the Indian town.

Q. Frank fell down first, after Itow had hit him, and then got up and walked; is that correct?

A. Yes.

Q. How far away from the bridge leading up to the China house was Frank at the time he fell down after he was stabbed.

Interpreter. How far from the—

Q. How far from the bridge leading up to the doorway of the China house was Frank when he fell down after he was stabbed?

Interpreter. How far away from the bridge, you want to know—the last time you refer to, you want to know?

Q. Yes.

A. Seven or eight steps.

Q. Now, I understand you to say that when Frank struck Itow the first time Itow was lying on the ground near the bridge leading to the China house; is that correct.

Interpreter. When Frank struck Itow the first time?

Q. First time.

A. Yes.



Q. Then Frank came back to the China house did he?

A. Yes.

Q. And Itow followed him up to the doorway?

A. Yes.

Q. And then Frank knocked Itow down near the doorway?

A. Yes—no; he did not knock him down but struck Itow.

Q. Struck Itow?

A. Yes.

Q. And Itow fell down?

A. No.

Q. Did Frank ever knock Itow down that time?

A. No.

Q. Now, where did Frank strike Itow that last time?

A. I don't know just where.

Q. Now, was Frank standing in the doorway of the China house at the time Itow stabbed him, stabbed Frank?

A. He—he wasn't.

Q. Well, how far from the doorway was Frank standing at the time?

Interpreter. You refer to stabbing?

Mr. Rustgard. Yes.

A. Near the—can't tell just where, but anyhow near the lower end of the bridge referred.

Q. Was Itow standing up or lying down at the time he stabbed Frank?

A. Well, he was sitting on the ground on—squatting, he means.

Q. Itow was sitting on the ground?

A. Sitting on the ground; yes.

Q. And where was Frank standing—standing up or lying down?

A. He was lying down.

Q. Frank was lying down?

A. Yes, he was lying down.

Q. Well, what was he lying down for?

A. Well, I think Itow fell down and then Frank also fell down too; first you know Frank was hitting Itow, you know, he says.

Q. Well, do you know any reason why Frank should fall down at that time?

A. Possibly he—he sight slip over something; that is what he says, slipped over something and fell down.

Q. Now, was Frank lying on his back or on his stomach at the time?

A. He was lying down on his stomach.

Q. Now, how far away were you at that time?

A. I was upper end of bridge then.

Q. You saw Itow stab Frank at that time?

A. No, I didn't see it.

Q. How did you find out that he stabbed him?

A. Why, he—Itow—hollered that he hurt Frank, you see.

Q. He called out that he hurt Frank?

A. Yes.

Q. Did Frank get up again and walk awhile?

A. He just walked seven or eight steps and fell down.

Q. Didn't Itow say at that time that he had killed Frank?

A. No; he did not say so.

Q. What did Itow do with the sword he had?

A. When I saw him he had it in his hand.

Q. What did he do with it at last?

A. Well, I didn't see what he did with it at last, but I heard afterward he gave it to the superintendent.

Q. Were you there at the time Itow shot one of the Mexicans?

A. Well, I was quite away, I was—going home, he says; I don't know, going home from the superintendent's, you see; I didn't see.

Q. How far away from Itow were you when he shot?

A. I don't know for sure, but forty or fifty steps, I should say.

Q. What did he shoot for? Do you know?

A. No.

Q. Do you know about any quarrel between Frank and Itow before this?

A. Not that I know of.

Q. Haven't heard of any disagreement between them?

A. —

Mr. Rustgard. Ask the question.

A. No; I didn't hear anything about it.

Q. You are sure of that?

A. No; I never heard they quarrel or fight.

Q. Did you hear about any quarrel between the two or any disagreement between them about anything?

A. They—he says; I don't understand that—he doesn't refer to fight, but he says they had an argument I hear, he says.

Q. Where was that?

A. In the Japanese house.

Q. When was that?

A. A long time before that thing took place.

Q. How long?

A. Oh, week or ten days before that time.

Q. Now, what was that argument or disagreement about?

A. I don't know what about, I went in there and saw that is all.

Q. Well, now, I want you to tell me what that disagreement was about; you know all about that?

A. What I heard was that Frank wanted to go away from the camp; that is what I heard.



Q. Now, did Itow expect Frank to go away that night he was killed—that night Frank was killed?

A. I don't know.

Q. Had you any talk with Itow about Frank that evening before the killing?

Interpreter. This man?

A. No; he did not say anything.

Q. Had you been looking for Frank that evening?

A. Yes.

Interpreter. Looking for Frank?

Mr. Rustgard. Yes.

Interpreter. Maybe I did not understand that?

Q. Had you been try to find Frank?

Interpreter. Oh, I see.

A. Yes. That is—he means—

Interpreter. I put it this way, the question—you know you say look for.

Mr. Rustgard. Yes.

Interpreter. I said in Japanese, if he hunt for him, that is all right?

A. He said "yes."

Q. Where did you go and hunt for him?

A. Went to the carpenter's place.

Q. Oh, yes. What time were you there trying to find him?

A. I don't know; it was night time, but I don't know.

Q. How long before this fight?

Interpreter. Oh, excuse me; he said afternoon; I misunderstood—not night time—I misunderstood him.

Q. What time in the afternoon?

A. I don't know what time it was, but it was toward evening, he says.

Q. Toward evening. Now, what did you want to see Frank about at that time?

A. Frank was a friend of mine, so I just looked for him. I used to drink together with him.

Q. Did you find Frank at that time?

A. No.

Q. Did you ask anybody where Frank could be found?

A. Cook—and I asked the cook and carpenter, he says.

Q. Are they here, any of them.

A. Yes (indicating).

Q. What did you say to that man?

A. I don't remember what I said to him.

Q. Didn't you tell him at that time that you wanted Frank to come and take a drink with you?

A. No, I didn't say that.

Q. Was Itow with you at that time?

A. No.

Q. Where is Nakayama now?

A. I don't know where he went from the cannery—he means when the cannery finishes.

Q. Now, this time Frank was killed, was Itow with you at the time you went to the Chinese bunkhouse—on the occasion upon which Frank was killed, did Itow go with you at the time you went to the Chinese bunkhouse?

A. No.

Q. Where was Itow standing at the time you went in?

Interpreter. To the bunkhouse, you mean?

Mr. Rustgard. Yes.

Interpreter. Chinese bunk—

A. I don't know.

Q. Did you ask for Frank when you came in that time?

A. No.

Q. Was the door locked at the time you came to go in?

A. Yes.

Q. How did you get in, then?

A. Frank opened the door.

Q. Did you knock on the door?

A. Yes.

Q. And Frank opened the door?

A. Yes.

Q. Did Frank say anything to you at that time?

A. He might say something, but I don't remember what he said.

Q. Did you say anything to Frank at that time?

A. I don't remember now.

Q. What did you go in there for at that time?

A. For the purpose to go to the toilet.

Q. Is the toilet in the bunkhouse?

A. Yes.

Q. Haven't you got a toilet over at the Japanese bunkhouse?

A. No.

Q. What time of night was this?

A. About eleven or twelve.

Q. Was it pretty dark at that time?

A. It was dark, but not very dark, he says.

Q. Do you remember whether it was raining or clear weather?

A. I don't remember; I did not pay any attention to the weather, I don't know.

Q. (By Ass't U. S. Attorney Folsom). Was there a light in the bunkhouse; was there any light in the Chinese bunkhouse at the time?

A. I don't remember.

Mr. Rustgard. Ask that to be marked as an exhibit.



The trial resulted in a verdict and sentence against Itow of murder in the first degree, and he was sentenced to hang. Fushimi was convicted of manslaughter and sentenced to twenty years in the penitentiary.

The case was first taken to the Supreme Court on writ of error, but was dismissed for want of jurisdiction. Within the time allowed by the Alaska Code (Com. Laws of Alaska, sections 1337—1338) a writ of error was sued out from this court.

The errors relied upon for a reversal are:

1st. Gross abuse of discretion of the trial court in forcing the defendants to trial before their counsel had any opportunity to prepare the defense, and which prevented a fair trial.

2nd. Unfair and illegal conduct on the part of the District Attorney calculated to prejudice the jury against the defendants, and the refusal of the court to discharge the jury and order a mistrial on defendant's motion after the discovery of such conduct.

3rd. Error of the court in permitting the jury after they were selected, impaneled and sworn, to separate and mingle with the community at large at each adjournment prior to the time they were charged.

4th. Error of the court in admitting in evidence the statement of E. Fushimi taken December 10th, 1912.

5th. Refusal of the court to give instructions requested.

These points are raised by the first four and the seventh assignments of error.

First. The court erred in refusing the application of the defendants to postpone the trial of this case until January 15th, 1913, and until the arrival in Juneau, Alaska, of the witnesses for the defense, and a reasonable time and opportunity for defendants' counsel to see said witnesses and make reasonable preparation for trial; and in compelling defendants to go to trial on January 2nd, 1913, before the arrival of said witnesses, and thereby in effect denying to defendants the right to have their counsel make an opening statement to the jury; and in denying the motion for a new trial, based upon this ground.

Second. The court erred in not discharging the trial jury and entering a mistrial, upon the request and motion of the defendants, for the reasons stated in said motion, viz: That the jury having been selected, impanelled, and sworn, were allowed to separate on each adjournment, or recess of court, and go at liberty about the town of Juneau; that on

January the 7th, while the jury were so separated and at liberty, the district attorney gave out an interview to a newspaper reporter, which was published in Juneau on said date, an article entitled, "Japanese Are Accused of Many Crimes," and in refusing to grant a new trial on this ground assigned in said motion, a copy of said article being attached to such motion.

Third. The court erred in permitting the jury, after they were selected, impaneled, and sworn, to separate and go about their several vocations at each adjournment or recess of the court until the case was finally given to the jury.

Fourth. The court erred in over-ruling the objections of the defendants to the purported confession or admission of the defendant, Fushimi, made before the district attorney, and permitting the same to be read in evidence to the jury.

Seventh. The court erred in refusing the following instructions to the jury requested by the defendants, to-wit:

"You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and

believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed, or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

“It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty.”

### ARGUMENT.

First. We are fully aware of the rule that matters within the discretion of the trial court seldom furnish ground upon which to predicate reversible error in a Federal Court. And matters relating to postponments, etc., are usually discretionary. But no Federal Appellate Court, so far as we are advised, has ever said that *gross abuse* of discretion in the lower court would not warrant a reversal. In



nearly all the cases we have read, over-ruling assignments based on such matters, it is said that to warrant a reversal there must be gross abuse of discretion.

The question here presented we believe may be fairly stated thus: Did the action of the Court, complained of, deny the defendants a fair and impartial trial, such as is guaranteed by the Constitution and is inherent in the very nature and spirit of our laws.

Among some of the rights which every defendant is supposed to have as a matter of course, is the right to be represented by counsel, and to have an opening statement of his defense made to the jury. The exercise of those rights presuppose that a reasonable opportunity has been given counsel to prepare himself to undertake the defense, by ascertaining what the testimony of the witnesses will be, reconciling apparent conflicts, and especially to be able to adequately cross-examine the witnesses for the prosecution so that facts which explain or weaken their testimony in chief may be brought out.

We apprehend that if a trial court arbitrarily denied a defendant the right to counsel, or the right to make an opening statement to the jury, this court would set aside a conviction so obtained. Yet there is no doubt but that that is what the court in effect did in this case.

In this connection it must be borne in mind that



the defendants are Japanese fishermen, unable to understand, or make themselves understood, in the English language. Every particle of information concerning the matters with which they stand charged, had to be obtained by their counsel through the slow, laborious and uncertain medium of an interpreter. Most of the testimony for the government was given in English or Spanish, which they could not understand, and of any inaccuracies or omissions therein as given from the stand they would be unable to advise their counsel during the progress of the trial.

Under such conditions common fairness to the accused, the most ordinary desire to see that a possibly innocent defendant should not be convicted, should, we think, have induced the district attorney and especially the court, to have given ample opportunity for the preparation on the part of counsel for the accused, which every case requires.

What were the facts? Defendants were indicted on December 14th, 1912, and arraigned the same day. On the next day in the absence of their counsel, they had counsel assigned to them, and were required to plead. At the time all their witnesses were in Seattle and Portland. Five days later, as soon as the whereabouts could be ascertained process was gotten out for them. Under these conditions defendants made no unreasonable request. They asked no

long postponement—only till January 15th, so that their witnesses could arrive and the obviously necessary preparation for so important a trial be made. This modest and extremely reasonable request was denied. Defendants were put upon trial on January 2nd before a single one of their witnesses had arrived in Juneau. There was no certainty that they would arrive at all. Under these conditions defendant's counsel had no alternative but to decline to make an opening statement. Defendants were as effectively deprived of this valuable right, as if the court had peremptorily denied it them. Manifestly the right to make an opening statement carries with it the right to an opportunity to be informed of the facts by the witnesses by whom the facts are to be proved so, as to render the right of some value.

To hold otherwise is to sacrifice substance to shadow, to "Keep the promise to the ear and break it to the hope." The right to be heard by counsel, to make an opening address to the jury, to cross-examine witnesses, necessarily involves the right to an opportunity for such preparation as will make these rights of some value.

If an American citizen were arrested in Japan charged with a grave crime, and put upon trial without any opportunity to prepare his defense, and convicted before a tribunal composed entirely of Japanese, we venture to say our government would vigorously protest.

Second. On January 6th the government closed its case in chief. None of the defendants' witnesses had at that time reached Juneau, and the trial could not proceed except *ex parte*. So an adjournment was taken until the tenth. During those four days the jury were at large in the town. On the 7th there was published in a daily local paper the purported interview with the district attorney. We say purported, because the district attorney while acknowledging that he was correctly quoted by the reporter said he did not intend for it to be published. Upon the opening of court on the 10th defendants' counsel called the court's attention to this publication and that the jury were at large, and moved their discharge and that a mistrial be entered. The court called the jury into the box and without swearing them or requiring an answer, asked that if any one of them had read the article in question to hold up his hand. There was no response and the motion was immediately denied and the trial ordered to proceed.

What more could counsel for defendants do? It was manifest that if at least some of the jury had not read this article a miracle had happened. Manifestly counsel could not go to each of the jury and ask them if they had read it. All he could do was to show that they had been exposed to this poisonous outside influence under circumstances that rendered it at least extremely probable that it reached them,



and ask that they be discharged. The court then of its own motion asked the jury en masse that if any one had read it to hold up his hand, and no response was made—as against the almost certain inference under the circumstance that some at least of the jury had read it, we have the mere silence, when invited, not required to speak. And it may be said that it is doubtful if all the jury apprehended fully what was going on, or the purport of the question put by the judge, in the few seconds given the transaction.

‘It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence the separation of the jury in such a way to expose them to tampering may be reason for a new trial, variously held as absolute; or *prima facie*, and subject to be rebutted by the prosecution; or, contingent on proof indicating that tampering really took place.’

*Mattox vs. U. S.* 146 U. S. at page 149.

The Supreme Court does not indicate which of the three rules laid down, it approves. If the right is absolute, the jury should have been discharged; if subject to rebuttal, the government did not rebut it; if contingent upon proof indicating that tampering

really took place, the defendants furnished all the proof the nature of the case made reasonably possible.

This much, however, can be said: The verdict in this case must always rest under the greatest suspicion that it was, in part, at least, due to publication of the district attorney's interview. Should a human being be put to death on such a verdict? Is it to be "tolerated"?

Third. The right to a trial by jury in criminal cases, is guaranteed by the Sixth Amendment to the Constitution. The jury here referred to has been held to be the jury as known at the Common Law. And any statute which abridges this right is void.

*Rasmussen vs. U. S.*, 197 U. S. 156.

That case struck down a provision in the Alaska Code (copied from Oregon) providing for a jury of six in misdemeanor cases.

And in *Thompson vs. Utah*, 170 U. S. 343, it is said:

"The word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument."



In other words it was the rule of the common law, unmodified by any statute.

What was the trial "by jury" at the common law?

"In all the trials for felony, it was necessary, at common law, to keep the jury together in charge of an officer, and not to permit them to separate from the time of their being impaneled and sworn."

12 *Cyc.*, 671, citing Chit. Cr. Law 628.

But it may be argued, defendants' counsel agreed to it. True he did. He could not afford to run the risk of offending some of the jury by not agreeing. But if it was necessary to a constitutional "trial by jury" that the jury be kept together, then neither the defendant nor his counsel could consent.

12 *Cyc.* 672.

In view, however, of the advantage that was sought to be taken of the fact of the jury being at large, the government ought not now to be heard to say that defendant agreed. Certainly neither he nor his counsel would ever have made such an agreement if it had been suspected that the district attorney was going to print in the daily paper his interview concerning the matters on trial.

Fourth. After the government closed its case in chief, and after the defendants had examined one

witness, the government sought and obtained leave to re-open the case; and offered in evidence the unsworn statement of Fushimi made before the district attorney on December 10th, 1912, and taken down by a stenographer. The statement, the objections thereto and the court's ruling and the exceptions are already set out.

The district attorney and the court seem in this matter to have proceeded upon the theory that a conspiracy had been proven, and that the declarations of one conspirator are admissable against all. But if any conspiracy ever existed it had terminated July 14th, 1912, the date of the alleged murder. The rule then had no application, and the evidence should have been excluded.

Wharton Cr. Ev. 9th Ed. Sec 699.

“Nothing is better established than that statements made by an accomplice or co-conspirator after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial unless made in his presence.”

*People vs. Dresser*, 17 Cal. Ap. 28

*S. C.*, 117 Pac 68.

Fifth. The bill of exceptions shows that the in-

structions set out in the assignment were seasonably requested, refused, and exception taken.

Carter's Alaska Code, Sec. 12, provides :

“That the killing of a human being is also justifiable when committed by any person as follows :

First. To prevent the commission of a felony upon such person or upon his ——— servant.

Third. ——— in the lawful attempt to suppress a riot or preserve the peace.

The deceased was a member of a band of Mexicans hired by the Japanese contractor, and was under the supervision and direction of Itow.

The defendants claimed that Itow sent Fushimi and Nakayama to lock the door of the bunkhouse; that when they reached the door they were attacked by the deceased and the Mexicans; that Itow, hearing the noise of the fight, seized a sword and pistol, and hastened to the scene of the trouble, intending and expecting to overawe the fighting men and restore order; that when Itow reached the scene, he was set upon by the deceased, who seized the sword which was still sheathed, knocked Itow down the inclined way leading to the door of the bunkhouse, and as he fell deceased drew the scabbard from off the blade, and in

his drunken condition himself fell down the incline upon Itow, impaling himself upon the sword, the hilt of which was broken against the rocky ground by the impact of the deceased upon the sword. In view of this testimony the charge requested should have been given.

It has been necessary to prepare this brief from the original record and it has therefore been impossible to cite the pages of the transcript. In capital cases taken to the Supreme Court, prior to the enactment of the judicial code, the practice was for the transcript to be printed at the expense of the government. In the majority of cases, the defendant has not the means to have it done, (as in this case) and the result is greatly increased labor for both the counsel and the Court.

In conclusion we ask that the judgment of the lower court be reversed, and a new trial awarded.

Respectfully submitted,

J. H. COBB,

Attorney for Defendants.

